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IN THE

Supreme Court of the United States

October Term, 1951
No. 259

CITIES SERVICE OIL COMPANY,
Petitioner,

against

PARK STEAMSHIP COMPANY LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

EUGENE UNDERWOOD
Counsel for Respondent
27 William Street
New York 5, N. Y.

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Opinions Below

The opinion of the District Court (R. 360-74) is reported at 93 F. Supp. 201. The opinion of the Court of Appeals for the Second Circuit (R. 382-6) is reported at 188 F. 2d 804.

Jurisdiction

The jurisdictional requisites are adequately stated in the petition.

Question Presented

There is no question of responsibility for navigation, nor any question of responsibility for a pilot's negligence. This is a safe berth case. The question presented can best be stated in the language of the Court of Appeals:

> "The issue presented for decision is whether the charterer or the owner was obligated to select a safe berth for discharging into lighters in an area containing both safe and unsafe berths" (R. 383).

The answer is to be found in the words of this charter as applied to the facts of this case.

Statement

Petitioner chartered respondent's steamship CLEARWATER PARK, a tanker, for two consecutive voyages from a safe port in Venezuela, to be named, to "One safe port U. S. North of Hatteras, Norfolk/Portland Range, at charterers option, as ordered on signing Bills of Ladings".

In addition to the Safe Port Clause just quoted the charter contained the following Safe Berth Clause:

> "The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. The Charterer shall have the right of shifting the vessel at ports of loading and/or discharge from one safe berth to another on payment of all towage and pilotage shifting to the next berth, wharfage and dockage charges at that berth, additional agency charges and expense, customs overtime and fees, and any other extra port expenses incurred by reason of using more than one berth. Time consumed on account of shifting shall count as used laytime except as otherwise provided in WSA Rate Orders and Rate Advices."

As the District Court found, on both voyages petitioner

> " * * * ordered the CLEARWATER PARK to load at Las Piedras, Venezuela and designated 'Boston Harbor Hingham Bay Anchorage into lighters' as the place and manner of discharge * * * " (f. 1080).

Despite its duty under the Safe Berth Clause to "designate and procure" a safe discharging "wharf" or "place", petitioner failed to give any more explicit instructions but left respondent to find a safe berth within Hingham Bay as best it might. On each voyage the place where the vessel dropped anchor was chosen by Pilot Cleverly who, respondent claimed, was hired by petitioner for that purpose, which petitioner denied. It was agreed, however, that Pilot Cleverly was "the Hingham Bay specialist" (R. 121).

On each voyage the vessel was navigated to the point where she dropped anchor without incident. On the first voyage she remained safely at anchor from the morning of December 17, 1945 until the night of December 19-20 when she dragged anchor in a moderate gale because the bottom at that point was poor holding ground, and struck bottom suffering damage (R. 361-2, 385). On the second voyage she remained safely at anchor from about 5:00 p. m. until about 9:45 p. m. on January 11, 1946 when it was discovered that she had, on the falling tide, settled on an uncharted rock, suffering additional damage (R. 364-6, 385).

Reasons For Denying the Writ

No Conflict of Decisions is Involved

Petitioner does not attempt to show any conflict between the decision below and any other decision. There is no conflict.

The decision below is simply the converse of the Court of Appeals' decision in *Cities Service Transp. Co.* v. *Gulf Refining Co.*, 2 Cir., 79 F. 2d 521, affirming *per curiam* *The Halo*, 9 F. Supp. 963, S. D. N. Y. In that case the present petitioner, owner of the HALO, sued Gulf Refining Company, charterer, for damage suffered by the HALO in an unsafe berth designated by the charterer. The charter clause closely resembled that at bar. The Circuit and the

District Courts held the charterer for designating an unsafe berth. Here petitioner's liability flows from an equivalent failure to "designate and procure" a safe berth.

In *Crisp* v. *United States & Australasia S. S. Company,* 124 Fed. 748, S. D. N. Y., the charterer was held for failing to provide a safe berth because it sent the ship to a berth beyond a bridge through which she was too wide to pass.

In *Constantine & Pickering S. S. Company* v. *West India S. S. Company,* 199 Fed. 964, the charter provided that the vessel should proceed "to such anchorage or safe dock to discharge cargo as ordered by consignee. Steamer, however, to lie always afloat" (p. 965). The vessel anchored at the point designated by charterer and grounded there. The charterer was held liable for breach of its safe berth covenant. Its liability was for half damages only, the ship's officers being held mutually to blame.

Here the District Court and the Court of Appeals, although urged by petitioner to do so, could find no negligence on the part of the officers or of the crew of the vessel.

In *Smith* v. *Burnett,* 173 U. S. 430, where the appellant was at once charterer and wharfinger of the vessel, he was held for the damage sustained when the vessel grounded in her berth, designated by appellant, because of appellant's failure to provide a safe berth.

Cases where liability has been decreed for failure to provide a safe berth are numerous. *P. Dougherty Co.* v. *Bader Coal Co.,* 244 Fed. 267, D. C. Mass.; *Merritt* v. *Sprague,* 191 Fed. 627, D. C. Maine; *The William L. Hooper,* 28 F. Supp. 770, D. C. N. J.; *Carroll et al.* v. *Holway,* 158 Fed. 328, D. C. Maine; *Eastern Mass. Street R. Co.* v. *Transmarine Corporation et al.,* 1 Cir., 42 F. 2d 58; *Cities Service Transportation Company* v. *Hartol Products Corporation,* 1936 A. M. C. 1703; *Nassau Sand & Gravel Co. Inc.* v. *Red Star Towing & Transportation Co. Inc. et al.,* 2 Cir., 62 F. 2d 356.

No Question of General Interest is Involved

The most important words in the Safe Berth Clause, "designate and procure", are not found in time charters or in any common form of charter for dry cargo vessels. They are found only in the revised form of the Warshipoilvoy charter. The revision of Warshipoilvoy containing these words was promulgated effective November 1, 1945. 10 F. R. 13454, 1945 Supp. to Code of Fed. Reg., Title 46, Sec. 303.2. However, this form was deleted from the Code of Federal Regulations in 1948, presumably being obsolete. 13 F. R. No. 246, p. 7866-7, December 18, 1948.

Although Warshipoilvoy was used throughout World War II no other suit arose, so far as we know, under the Safe Berth Clause and, so far as we know, no other suit is pending which will or can be affected by the decision below.

Nothing is at stake except petitioner's liability for the groundings of the CLEARWATER PARK in December, 1945 and January, 1946.

If tanker charterers, most of whom are also shipowners, do not like the Court of Appeals' decision, of which we have seen no evidence, the form of the clause can quickly and readily be changed. New York is the center of the world-wide tanker market and such a change could be accomplished practically overnight.

No Question of Navigation is Involved

On each voyage the vessel had ceased navigating and had been at anchor for a substantial time before grounding and sustaining the damage sued for. On the first voyage she was at anchor 36 hours before she dragged to a shoal spot. On the second voyage she was at anchor about 5 hours before she settled on an uncharted rock on the falling tide (District Court opinion, ff. 1083-5, 1092-6).

Thus on neither voyage was the damage sustained either while navigating or because of the manner in which she was navigated. Both groundings resulted from inherent characteristics of the berth in which she lay; on the first voyage, poor holding ground; on the second voyage, an uncharted rock.

It follows that the decision below does not in any degree minimize the shipowner's responsibility for navigation, or pass to the charterer any responsibility therefor. It is consistent with the decision below that the shipowner must navigate his vessel to destination, albeit the charterer has covenanted to "designate and procure" that destination by naming a berth which must be safe.

Even if the designation of the berth, the destination, could be deemed a part of the navigation toward that destination there would be no difference in the result. It is consistent with maritime practice in charter and other situations for the parties, by agreement, to pass from one to the other the onus of specific aspects of navigation. In *Crisp* v. *United States & Australasia S. S. Co.*, 124 Fed. 748, S. D. N. Y., almost half a century ago the charterer was held for a pilot's negligence in attempting to navigate the vessel through a bridge too narrow her her, this being in breach of the charterers' safe berth covenant. In *Sun Oil Company* v. *Dalzell Towing Co., Inc.*, 287 U. S. 291, this Court sustained a clause passing from the tugowner to the shipowner responsibility for the tug captain's negligence when acting as pilot. In *Robbins Drydock and Repair Company* v. *Navigazione Libera Triestina, S. A. and Moran Towing and Transportation Company, Inc.*, 261 N. Y. 455, and *Moran Towing & Transportation Co., Inc.* v. *Navigazione Libera Triestina, S. A.*, 2 Cir., 92 F. 2d 37, *certiorari denied* 302 U. S. 744, it was made clear that such agreements would be enforced as between the parties thereto, although not binding upon third parties. In *The Endsleigh*, 124 Fed. 858, S. D. N. Y., a charter clause required the charterer to

provide and pay for all fuel for the vessel and the Court held that, although the procurement of fuel was generally for the shipowner, by reason of the clause mentioned, the charterer became responsible for the master's errors in procuring fuel. In *The Santona*, 152 Fed. 516, S. D. N. Y., a charter clause required the charterer to tally and receipt for cargo and the Court held charterer liable for the mate's errors in this respect although the tallying and receipting for cargo would, without the charter clause, be the shipowner's obligation.

If there were any conflict between the Safe Berth Clause and the clause in the printed form providing that the charter should not be deemed a demise, the Safe Berth Clause would, on familiar principles of construction, take precedence, it being typewritten.

The Decision Below is Right

The Safe Berth Clause required respondent to send its vessel to "any safe place or wharf" for discharge "which shall be designated and procured by" petitioner. Petitioner designated Hingham Bay as the discharging place, an area about 2700 yards long and about 700 yards wide. The option accorded petitioner of ordering the vessel to discharge "alongside vessels or lighters reachable on her arrival" is of no moment because it was not exercised. On both voyages lighters were sent to the vessel after she had anchored. As the District Court found, discharge into lighters was not the place but was the "manner of discharge" (ff. 1080-1).

The general designation of an area, irregular in shape, 2700 yards long by 700 yards wide, part of which was unsafe because of shoal spots, some of which were known but the shallowest of which was unknown, was not compliance with petitioner's covenant. The juxtaposition of "place" and "wharf" confirms that "place" means a spot, the equiva-

lent of a berth at a wharf, not an area. The purpose of the "place" is the same as the purpose of a berth at a "wharf", i.e. to enable the vessel to lie still there and discharge her cargo. She was not expected to discharge all over Hingham Bay; rather she was expected to drop anchor at one spot and stay there until discharging was finished.

This construction is supported by the *ejusdem generis* rule and by the interpretation put upon a similar clause by the British Court of Appeal in *Stag Line Ltd.* v. *Board of Trade,* 84 Ll. L. 1.

If respondent's vessel had grounded at a wharf designated by petitioner, petitioner would surely be liable for the ensuing damage. *Cities Service Transp. Co.* v. *Gulf Refining Co.,* 2 Cir., 79 F. 2d 521. Why should petitioner's liability be any less when the vessel was damaged at a "place" rather than at a wharf?

The commercial reason for the Safe Berth Clause has great weight. The cargo belonged to petitioner, who had use for it at a particular refinery and had to arrange to receive it from the ship. Here, as elsewhere, cost is a factor. The closer the ship comes to the refinery the less is the cost of lighterage, which is for petitioner's account. Despite what petitioner says (Petition p. 12) its witness expressly admitted that the nearer the vessel anchored to petitioner's plant at East Braintree the less expense petitioner would incur (ff. 553-4). For this sound economic reason petitioner reserved the right to designate either a "wharf", or a "place" other than a wharf, for discharging. Respondent gave up its right to determine at what place or wharf its vessel would discharge. In return, as consideration therefor, petitioner covenanted to "designate and procure" a "place or wharf" which would be safe. In this light it is obvious that the privilege of designating an area would meet neither petitioner's nor respondent's requirements. If petitioner could not direct the

vessel to the anchorage spot nearest to East Braintree respondent, by anchoring further away, could put petitioner to needless expense. On the other hand, what does it profit the shipowner to surrender the right to select the "wharf" or "place" if the charterer need designate only an area 2700 yards by 700 yards, not all of which is safe because of shoal spots, some known but the shallowest unknown?

It is inescapable that petitioner, having contracted for the privilege of designating the precise spot, assumed the correlative duty of designating the precise spot and a safe one. Both courts have found that the anchorage places were unsafe.

Even if the Safe Berth Clause could properly be construed to apply to an area rather than to an individual "place" of anchorage, it follows necessarily that petitioner's covenant of safety must apply to the whole area. There is nothing in the language of the clause that lessens its scope if the "place" designated be larger than a berth. On the contrary, the safety covenant applies with equal force whether the vessel be sent to discharge at a "wharf" or at a "place" no matter how large the "place" may be.

Conclusion

The decision below is correct. There is no question of general interest and no conflict exists. It is respectfully submitted, therefore, that the petition for writ of certiorari should be denied.

EUGENE UNDERWOOD
Counsel for Respondent
27 William Street
New York 5, N. Y.

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